

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of August, two thousand and six.

PRESENT:

HON. RALPH K. WINTER,
HON. CHESTER J. STRAUB,
HON. ROBERT A. KATZMANN,
Circuit Judges.

Aferdita Kacupaj, Eugert Kacupaj

Petitioners,
-v.-

No. 05-4287-ag
NAC

Alberto R. Gonzales, Attorney General,
Respondent.

FOR PETITIONER: Saul C. Brown, New York, New York.

FOR RESPONDENT: Stephen J. Murphy, United States Attorney for the Eastern District of Michigan, Susan El Gillooly, Assistant United States Attorney, Detroit, Michigan.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the

1 petition for review is GRANTED, the BIA’s order is VACATED, and the case is REMANDED
2 to the BIA for further proceedings in accordance with this decision.

3 Aferdita Kacupaj and Eugert Kacupaj (A95-476-782, A95-476-783), mother and son,
4 through counsel, petition for review of a Board of Immigration Appeals (“BIA”) decision that
5 dismissed their appeal from Immigration Judge (“IJ”) Michael W. Strauss's denial of their claims
6 for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”).
7 The BIA determined that, even assuming the credibility of Ardian Kacupaj—Aferdita's husband
8 and Eugert's father—there had been a fundamental change in conditions in Albania sufficient to
9 rebut any presumption of persecution.¹ We assume the parties’ familiarity with the underlying
10 facts and procedural history.

11 Under the regulations, the BIA does not have the authority to engage in factfinding
12 (except for taking administrative notice of commonly known facts). *See* 8 C.F.R. §
13 1003.1(d)(3)(i)(iv); *Xian Tuan Ye v. DHS*, 446 F.3d 289, 296 (2d Cir. 2006). Although
14 petitioners do not raise it in their brief, the critical issue in this case is whether the BIA did
15 engage in fact-finding in concluding that Kacupaj lacks a well-founded fear of persecution. We
16 believe it did and we will reach this issue, despite petitioners' failure to raise it, in order to avoid
17 manifest injustice. *See, e.g., United States v. Babwah*, 972 F.2d 30, 34-35 (2d Cir. 1992).

18 Specifically, the BIA erred when it made an independent determination regarding
19 changed country conditions in Albania. That is, whereas the IJ found that Kacupaj failed to
20 establish eligibility for relief because he was incredible regarding the beatings he and his wife
21 suffered in 2000, the BIA assumed credibility but denied his, his wife's, and his son's claims

¹ Ardian Kacupaj separately petitioned this Court for review of the BIA's decision regarding his claim. His case was filed under Docket Number 05-4294.

1 because it found that, due to fundamentally changed in circumstances in Albania, Kacupaj no
2 longer had a well-founded fear of persecution. In reaching this determination, the BIA relied on
3 the 2002 Country Report, which the IJ briefly discussed in his decision but about which the IJ
4 made no findings. The BIA also erred when it made independent determinations regarding
5 Kacupaj's eligibility for humanitarian relief under 8 C.F.R. § 1208.13(b)(1)(iii)(A) and *Matter of*
6 *Chen*, 20 I. & N. Dec. 16 (BIA 1989), and under 8 C.F.R. § 1208.13(b)(1)(iii)(B) (an applicant
7 may be granted asylum if “[t]he applicant has established that there is a reasonable possibility
8 that he or she may suffer other serious harm upon removal to [the] country.”).

9 Upon remand, the agency may consider the evidence on which the BIA relied, as well as
10 evidence of the return to power of the Democratic Party in Albania through general elections in
11 July 2005. *See Latifi v. Gonzales*, 430 F.3d 103, 106 n.1 (2d Cir. 2005). However, it must
12 remand to the IJ if it wishes to make findings based on this evidence. Since petitioners do not
13 raise their CAT claim in their brief to this Court, that claim is waived. *See Yueqing Zhang v.*
14 *Gonzales*, 426 F.3d 540, 542 n.1, 546 n.7 (2d Cir. 2005).

15 For the foregoing reasons, we GRANT the petition, VACATE the BIA’s decision, and
16 REMAND to the BIA for further proceedings consistent with this decision. Having completed
17 our review, petitioners’ pending motion for a stay of removal in this petition is DENIED as moot.

18
19 FOR THE COURT:
20 Roseann B. MacKechnie, Clerk
21 By:_____